Escalon, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PIK'D RITE, INC., and CAL-LINA, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-132-SAL 81-CE-132-1-SAL 9 ALRB No. 39

DECISION AND ORDER

On March 2, 1983, Administrative Law Judge (ALJ) Ruth M. Friedman issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent, General Counsel, and the United Farm Workers of America, AFL-CIO, (UFW) each timely filed exceptions, with a brief in support of exceptions, to the ALJ's Decision. Each party thereafter timely filed a brief in reply to the exceptions of the other parties.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties

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[1/] All section references herein are to the California Code unless otherwise specified.

and has decided to affirm her findings, rulings,[2/] and conclusions of law as modified herein and to adopt her recommended Order with modifications.

The ALJ modified the standard remedy ordered by the NLRB for the failure by an employer to timely notify the exclusive representative of its employees of its decision to cease operations. We do not believe such a deviation from NLRB precedent is warranted by the facts of this case. Accordingly, we shall order Respondent to bargain with the UFW with respect to the effects of its closure upon its former employees. (Royal Plating and Polishing Co., (1966) 160 NLRB 990 [63 LRRM 1945]; Transmarine Navigation Corporation, (1968) 152 NLRB 998, Supplementary Decision 170 NLRB 389; Walter Pape, Inc. (1973) 205 NLRB 719 [84 LRRM 1055]. Contrary to the ALJ, we will not exclude employees, on the basis of their seniority, from the potential entitlement to benefits to be negotiated. It is better left to the parties to negotiate the eligibility for and amounts of severance pay to be received by each employee.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Cal-Lina, Inc., its

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[2/] We affirm the ALJ's refusal to defer this case to arbitration as the dispute herein does not arise out of the contract. No arguable contract interpretation authorized Respondent to cease its operations without timely notifying the UFW.

We also affirm the ALJ's refusal to disqualify herself from hearing the matter. (Andrews v. ALRB (1981) 28 Cal.3d 781.)

officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing, in the event it resumes agricultural operations, to timely notify or give the United Farm Workers of America, AFL-CIO (UFW) an opportunity to bargain with it about the effects on its employees of any decision to discontinue all or a part of its business.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the UFW with respect to the effects upon its former employees of its termination of operations, and reduce to writing any agreement reached as a result of such bargaining.

(b) Pay to those employees on its payroll on July 8, 1981, their average daily wage for a period commencing ten days after issuance of this Order and continuing until: (1) the date it reaches an agreement with the UFW about the impact and effects on its former employees of its decision to discontinue its business; or (2) the date it and the UFW reach a bona fide impasse in such collective bargaining; or (3) the failure of the UFW either to request bargaining within ten days after the date of the issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to bargain; or (4) the subsequent failure of the UFW

to meet and bargain collectively in good faith with Respondent. In no event shall the back pay award for any employee exceed the lesser of either: (a) payment for the period necessary for the employee to obtain alternate equivalent employment in the next harvest season; or (b) the amount the employee received in wages from Respondent between July 8, 1981, and October 5, 1981, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole and backpay amounts, and interest, due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent any time during the period from July 8, 1981, until October 5, 1981.

(f) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with this Order, and continue to report periodically thereafter, at the Regional Director's

request, until full compliance is achieved.

3. If Cal-Lina, Inc., successor to Pik'd Rite, Inc., has resumed or resumes its agricultural operations, it shall:

(a) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(b) Provide a copy of the attached Notice to each agricultural employee hired during the 12 month period following the resumption of its agricultural operations.

(c) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to Respondent's assembled employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following any such reading, the Board agent shall be given an opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(d) Notify the Regional Director in writing, within 30 days after resuming agricultural operations, of what steps Respondent has taken to comply with this Order, and continue

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to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: July 7, 1983

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by failing to timely notify and give the UFW an opportunity to bargain about the effects on employees of our decision to cease operations. The Board has told us to prepare and publish this Notice and to mail it to those who worked for us between July 8, 1981, and October 5, 1981. If we resume operations, we are to notify any new employee of the terms of this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board.
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL on request, negotiate with the UFW about the effects of our closure on our former employees, including possible severance pay.

Dated: CAL-LINA, INC., (PIK'D RITE, INC.)

By: _____
(Representative) (Title)

If you have any questions about your rights as farmworkers or about this Notice, you may contact any office or the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

 DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Pik'd Rite, Inc., and
Cal-Lina, Inc. (UFW)

9 ALRB No.39
81-CE-132-SAL et al.

ALJ DECISION

Respondent, a family corporation formed in 1972, was engaged in the growing and harvesting of strawberries. Pik'd Rite and the UFW enjoyed a harmonious relationship until Pik'd Rite went out of business in 1981. The parties first negotiated a contract in 1972, which was renegotiated many times, the last agreement to expire in 1982. The final contract contained no provisions for going out of business or severance pay. During its renegotiation, Respondent had informed the UFW of its dire financial situation, and the UFW made some concessions as a result.

In 1981 Respondent decided to go out of business at the close of its summer harvest. It notified the UFW of its decision after the harvest was completed on October 5, 1981.

The complaint alleged that Respondent failed to bargain in good faith by not timely notifying the UFW of its decision to cease operations so as to provide them meaningful opportunity to bargain over the effects on the bargaining unit employees of that closure. The ALJ found that Respondent tentatively decided to go out of business in late 1980 and finally decided to do so no later than June 1981. She cited the facts that Respondent did not plant new strawberries, sold its processing plant, equipment, and its name, and terminated its land lease as support for her conclusion. Finding a violation with mitigation due to the long, positive relationship of the Respondent with the UFW, the ALJ modified the standard NLRB remedy for failure to provide a meaningful opportunity to bargain about the effects of a closure.

BOARD DECISION

The Board affirmed the ALJ's factual findings and legal conclusions, but ordered the standard NLRB remedy for the violation found. That remedy is a limited backpay award so as to restore the parties' respective bargaining power, as nearly as possible, to that which would have obtained but for the violation coupled with an order to negotiate the effects of the closure.

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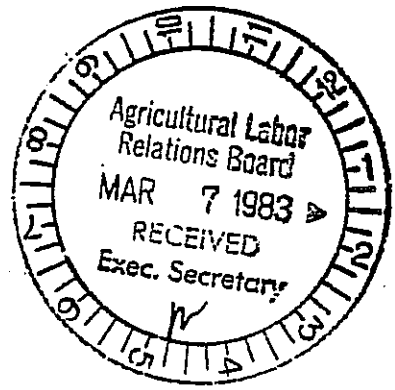
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	
	)	
PIK'D RITE, INC. and CAL-LINA, INC.,	)	Case Nos. 81-CE-132-SAL 81-CE-132-1-SAL
	)	
Respondent	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

Appearances:

James W. Sullivan of Salinas
for the General Counsel

Ramdolph C. Roeder, Littler, Mendelson,
Fastiff and Tichy of San Francisco for
Respondent

Marcos Camacho of Keene for the Charging
Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

RUTH M. FRIEDMAN, Administrative Law Judge:

This matter, charging violations of Labor Code sections 1153(a) and 1153(e) and based on charges filed by the United Farm Workers of America, AFL-CIO ("UFW" or "Union") was heard by me in Salinas on November 8, 9, and 10, 1982. The General Counsel issued a Complaint on August 20, 1982 which it amended on October 8, 1982. The UFW intervened, as a matter of right, pursuant to section 20266 of the Regulations.

The Complaint charges that Respondent decided to terminate its agricultural operations by June, 1981 and failed to notify the UFW of its decision to terminate its operations until October 5, 1981, by which time Respondent's last harvest season was completed. Respondent denies the allegations generally and also alleges, as affirmative defenses, that the Agricultural Labor Relations Board ("ALRB") failed to conduct an impartial investigation, that the Complaint fails to state facts sufficient to constitute a violation of the Agricultural Labor Relations Act ("ALRA"), and that the relief sought is not warranted by the law or the facts.

Before hearing, the Respondent moved to defer the matter to the grievance and arbitration procedures of the collective bargaining agreement then in effect between the Respondent and the UFW. The motion was denied. The Respondent also moved to disqualify the Administrative Law Judge. This motion was also denied. The General Counsel moved to strike Respondent's first affirmative defense that the Regional Director of the Salinas Region of the ALRB has failed and refused to

conduct an impartial investigation of the unfair labor practices charge. The motion was granted.

All parties were given a full opportunity to participate in the hearing. All parties filed post-hearing briefs.

Upon the entire record, including the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Pik'd Rite, Inc., was a California corporation engaged in agriculture in Monterey County from 1972 through 1981. On March 31, 1981, Anthony Grcich and Larry Grcich, the President and Secretary of the corporation, signed a certificate amending the name of the corporation to Cal-Lina, Inc. The Certificate of Amendment was filed with the Secretary of State on July 1, 1981. I find that at the times relevant to the events charged in the Complaint, Pik'd Rite, Inc. and Cal-Lina, Inc. were agricultural employers within the meaning of Labor Code section 1140.4(c).

The UFW is a labor organization within the meaning of Labor Code section 1140.4(f).

II. The Operation of Respondent's Business

Pik'd Rite, Inc., began growing and harvesting strawberries in Monterey County in 1972. The stock of the corporation was owned by Anthony Grcich, hiw wife, Helen M. Grcich, and their children, Larry, Sandra, Susan and Judy. The business was personally managed by the stockholders and their spouses.

Prior to 1972, Anthony Grcich had grown and harvested strawberries in the same general area under different names. Until March 31, 1981, Pik'd Rite also owned a strawberry processing plant in Escalon, in Stanislaus County; at the time of the hearing, Anthony Grcich was the president of the processing plant but had no ownership interest in it. On March 31, 1981, the corporation, through its stockholders, relinquished the name Pik'd Rite and changed the name of the corporation to Cal-Lina, Inc.

On October 5, 1981, after the 1981 harvest was complete, the Company, through its attorney, notified the UFW that it was "contemplating seriously a permanent closure of operations" and offered to meet to discuss the decision and its effects on bargaining unit employees. The Company ceased agricultural operations in the Salinas Valley as of the end of the 1981 season. The Complaint does not allege that the parties subsequently failed to bargain in good faith.

III. Respondent's Bargaining History with the UFW

Anthony Grcich, for Pik'd Rite, voluntarily recognized the UFW in 1972 and executed a collective bargaining agreement. Since 1972, when Pik'd Rite was founded, there has been a continuous collective bargaining relationship between the parties which both sides characterized as pleasant and cooperative. In 1974 Cesar Chavez, the President of the Union, asked Anthony Grcich to serve as a trustee on the Union's Juan De La Cruz pension trust and the Union's Robert F.Kennedy Medical Trust, which he did. Mr. Grcich visited Union headquarters at La Paz on several occasions for meetings and to express support for the Union.

At several meetings of representatives of Union ranch committees, Cesar Chavez spoke highly of the good work being done by Mr. Grcich.

When the Company began strawberry operations in Oxnard and Firebaugh, in 1974 and 1977, Mr. Grcich approached the Union and agreed to extend the benefits of the Salinas contract to the employees in Oxnard and Firebaugh as well. As a result, Respondent was paying higher wages and benefits than other strawberry growers. Mr. Grcich says that he has been faced with continual hostility and even ostracism from other growers for voluntarily recognizing the Union and paying higher wages and benefits. The Union stipulated that Cesar Chavez knew that other growers were hostile toward the Company for letting the Union in.

After the Agricultural Labor Relations Act took effect in 1975, the ALRB conducted separate elections among the employees of the Company in Salinas, Firebaugh, and Oxnard. The Company cooperated in those elections. It did not conduct any election campaign and never filed objections to the conduct of the elections. The UFW was certified as the exclusive bargaining representative of all the agricultural employees of the employer in the Salinas Valley excluding packing and freezer shed workers on September 26, 1975 (Case No. 75-RC-116-M).

In 1978, the Company went out of business in Oxnard and Firebaugh. Beforehand the Company told the Union that it was suffering financial losses, but it never told the Union it was going out of business until it actually stopped operations.

The Union did not ask to bargain with the Company about the decision to go out of business in Oxnard or Firebaugh and it did not ask to bargain about the effects of the closing on the employees. At one time, the Company farmed 1100 acres of strawberries; during its last season of operation, it farmed 150 acres of strawberries.

IV. What the Union was Told About the Company's Financial Position Prior to the Negotiations for the 1981-1982 Contract.

The Pik'd Rite strawberry growing operation lost money from its inception and during each series of negotiations for a collective bargaining agreement the Union was so informed. The Company gave the UFW the opportunity to examine its balance sheets from 1976 and from them the Union was able to ascertain its income and expenses, profits and losses.

In January, 1979, in the course of proposing wages raises during negotiations for a collective bargaining agreement which eventually covered the period of January, 1979 through December, 1980, Mr. Grcich told the Union negotiator that they had had huge financial losses during the past three years and their costs were from two and one-half to three and one-half cents more per pound than the competition. Mr. Grcich wrote:

> As I indicated to you and the committee at our meeting, we have no doubt that the farm laborers throughout California, and especially the United States, are not receiving the revenues that many of the other industries are receiving. But you, your committee and the Union must recognize that I, being the only strawberry grower in the area that has a Union contract, cannot be forced to pay a hourly scale or a piece rate that will drive me out of business...

Nonetheless, the Company apparently accepted the Union's

rejection of its proposal that the former contract be extended with no increases, and proposed increases. During the negotiations, the Company informed the Union that with the present financial situation, the Company was not planning to plant additional acreage.

In May, 1980, the Company proposed a system of fronting operating expenses to farmworker families who would cultivate, harvest and manage a few acres on their own and reap the profits, if any, after paying back a portion of the expenses. By this plan, Respondent would supply land and other supplies and machinery and buy all of the strawberries harvested for its processing plant. On October 3, the Company formally presented a cost analysis and indicated it wanted to begin on October 15 to select families to farm its acreage in the manner proposed instead of having the Company itself continue its farming operation.

Meanwhile, the Union informed the Company that it was ready to begin negotiations for a new collective bargaining agreement. On October 15, 1980, after receiving the request to bargain, Anthony Grcich wrote the following letter to Richard Chavez of the UFW:

> During the last couple of years, I am sure that you had been informed by your staff that Pik'd Rite had reduced its farming operations considerably. Months ago Larry [Grcich] had met with your Union representatives and the Farm Committee with a program to convert some of our former strawberry operations into independent family operations, a progressive idea which has convinced me and the bank to help finance these independent families for various cultural practices which will enable them to have their own business. Because of this proposed arrangement, I will contact you right after the first of the year as to what, if anything,

Pik'd Rite will be farming.

Over the past years, Richard, I have enjoyed working with you and Cesar even though at times we may have had some differences of opinions. The cooperation that you and your organization have given me is appreciated. If at any time I can be of assistance, please do not hesitate to call upon me.
[Emphasis added]

Gretchen Laue, the Union negotiator assigned to the negotiations for a new contract, answered that the proposed change to independent family operations was a unilateral change to be bargained and a violation of the contract in effect until December 31, 1980. She proposed meeting dates. At the hearing, Ms. Laue testified that Richard Chavez told her before negotiations began that the Company wanted to go out of business.

V. The 1980-1981 Collective Bargaining Negotiations

The Union and the Company first met on November 5, 1980, to negotiate a collective bargaining agreement to succeed the agreement that was to expire on December 31, 1980. They met eight times and wrapped up an agreement in March, 1981. The agreement was ratified by the members of the bargaining unit on April 25, 1981 and took effect immediately, retroactive to January 1, 1981. Through no fault of the Respondent in this action, the agreement was not actually signed until August 27, 1981.

The main focus of all of the meetings was the financial losses the Company had suffered in the past and the need for it to cut costs substantially in order to stay in business. At the first meeting, Anthony Grcich discussed the dimensions of the Company's financial problems and talked about

the reasons why his costs were greater than those of other strawberry growers; wages and benefits were greater, the former contract required excessive overhead costs and guarantees of wages and hours; some workers refused to work through the whole season; and workers engaged in unsanctioned work actions in an effort to get higher wages when labor was scarce. According to the Company, the fact that foremen were in the bargaining unit thwarted effective discipline. At the first meeting, Anthony Grcich specifically discussed the possibility that the Company would go out of the farming business if it continued to lose money. The Company urged the Union to consider its family operation proposal, where individual families would share with the Company the risk of an unprofitable operation.

At the second meeting, the Union rejected the family operation proposal (the Union negotiator referred to it as "sharecropping"). The Union negotiator said there were then two alternatives: either negotiate a contract with changes to accommodate the Company's financial needs or negotiate severance pay. A severance pay figure of 25% of the employees' wages of the previous season was mentioned. Mr. Grcich said, "What severance pay? There is no severance pay. We are in debt. We have no money." This was the end of the discussion of severance pay and there are no provisions for the Company's going out of business, severance pay or otherwise, in the contract that was signed.

During the negotiations, both the Company and Union made proposals to increase the Company's efficiency and lower costs.

Agreement was reached on all proposals in an amicable fashion. At virtually every meeting, the Company representative said (1) that if cost cutting did not work to stop losses, they would have to go out of business, and (2) they hoped the losses would stop because they did not want to go out of business. In November, Anthony Grcich said he did not want to go out of business and hoped he would not have to go out of business, "but...it was not any more a decision for him; it was what had to happen" because they were losing money over the years. On November 21, Grcich said he would like to see the strawberry acreage increase to where it had been in the past. On December 19, he said he was not sure that the proposals the Union was making would "work" to reverse the losses and that the Company had a bad history. He said he was disappointed there was not more movement in the benefits. At the next meeting, on January 30, the Company made a "final" offer eliminating some fringe benefits, and the Union basically accepted the offer.

In the agreement that was eventually ratified, employer contributions to the Union's pension plan were reduced by five cents per hour per employee and employer contributions to the Union's Martin Luther King, Jr. Fund and the Union's Citizenship Participation Day were eliminated for 1981. The apprenticeship program was removed from the contract. Guaranteed hours for punchers and checkers were reduced. Foremen, including irrigation foremen, were eliminated from the bargaining unit and given the power to hire and fire. Productivity standards were established and failure to meet them was made a cause for

discipline or discharge. Work rules were established. The pay scale was changed by guaranteeing an hourly rate and paying a bonus per crate at the end of the season to encourage workers to stay the whole season. However, at the same time the Company increased its contributions to the Union medical plan from 16 cents to 36 cents, and then in August, 1981, to 38 cents per employee per hour, and raised wages.

Until March, 1981, when negotiations were almost complete, both parties had proposed a one year contract. However, when it agreed to eliminate Company payments for the Martin Luther King plan and Citizen's Participation Day, the Union decided it wanted a two year contract. Anthony Grcich and Gretchen Laue, the Union negotiator, then had a conversation in which Mr. Grcich agreed to sign a two year contract if the Union would assure him that the waiver of payments for one year was not contingent on making payments the second year, and, if the Company were out of business, the Union would not sue him for the contributions they had waived.[1/] Accordingly, on April 7, 1981, Ms. Laue sent a letter to Mr. Grcich, which was later incorporated into the contract, as follows:

> This letter is to confirm our agreement in 1980 bargaining negotiations that because of the financial problems of Pik'd Rite, Inc., the United Farm Workers agrees to suspend payments of the Citizenship Participation Day and the Martin Luther King Farm Worker Fund until January, 1982, and to accept 15 cents an hour contribution to the Juan De La Cruz Pension.
>
> It is further understood payment [sic] to all the above-mentioned plans and funds will commence on January 1, 1982.

1/ At the hearing, Anthony Grcich said that he thought the Union was agreeing not to sue him for anything if he went out of business, but I do not credit his statement that that was the

> However, if the Company decides to cease completely its farming operation by 1982, the Company will not be held liable for funds not paid during the 1981 year. [Emphasis added].

This letter was the last piece of business before agreement was reached by the negotiators on the terms of the contract.

VI. The Company's Decision to End its Growing Operation

The record contains many indications that the Company made a tentative decision as early as October or November, 1980 to cease its operation after the 1981 harvest season. By the middle of the summer of 1981, the decision was virtually final.

When the Company sold its processing plant on March 31, 1981, it agreed to sell the right to use its name, but retained the right to use the name Pik'd Rite in connection with its farming and ranching operations until January 1, 1982. The change of name was actually filed on July 1, 1981. Although nothing precluded the company from operating a farming operation under a different name, relinquishing the name at the beginning of 1982 is some indication that as of March, Respondent had a strong notion that it would not be in the farming business in 1982.

As noted previously, the Company proposed to end its planting operation and begin a "family operation" in early 1979. In 1979, first year strawberries were planted, but none were planted after that. Strawberry plants produce fruit during the second year. They may be productive during their third year and rarely during a fourth year. The strawberries that

(Footnote 1/ continued)
understanding at the time. The letter that he requested does not say that and there is no indication that the Union intended to waive severance pay.

were planted in 1979 were harvested in 1980 and 1981. These plants were disked under in July and August, 1981. If the Company were to plant first year berries in 1981, they would be planted in July, and ordinarily land preparation would begin in April. This was not done. Sometimes first year strawberries were planted in October, November, or December, and land was prepared in July or August. This was not done either in 1981. If the Company had decided at the end of the 1981 harvest season to continue in business, it would have not had any strawberries to harvest.

On July 8, 1981, Respondent notified the lessor of the land on which it farmed that "Pik'd Rite, Inc., will be terminating their farming operation in the Salinas area, and therefore, ... will not be reentering into a lease concerning your land." Mr. Grcich's explanation at the hearing, that he had not actually decided to terminate operations, but was failing to renew the lease in hopes that he could later lease the land at a more favorable price, is inconsistent not only with the language of the notification, which contains arrangements for removing property and restoring the land, but is also inconsistent with the lease itself, which provides a one year renewal option at "the per-acre rent generally being obtained in the area for leases of comparable agricultural land." Further, a failure to renew the lease did not require notification until September 30, 1981; if in July, Respondent was still considering whether or not to terminate operations, it could have waited before notifying the lessor that it would

not be needing the land. Respondent did not make any serious attempts to locate other land to continue its agricultural operation in the manner it had been conducted under Union contract.

Respondent's balance sheets show that the strawberry crops showed losses throughout 1981. The gains during the peak harvest season in May and June were not enough to offset earlier losses. Since the only balance sheets introduced into evidence were those of the last year of operation, it is impossible to determine by a comparison of years when the Company realized or should have realized that the results of the season would not be good enough to justify continuing. Certainly, though, by the end of the peak in June, when losses on the strawberry crop were already over $200,000, the Company would have realized that the strawberries were not going to yield a profit that year.

The Union was not notified during the harvest season of the plans to terminate the operation. Instead, in July, during discussion of a grievance, Larry Grcich, who was the general cultural manager of the farming operation, told the paid Union representative and another worker that even though they were not planting, they had not made any decisions and were trying to see what would happen. He suggested that perhaps they would change the plants to another kind of vegetable. On July 22, Larry Grcich told workers who asked why certain strawberries were not being weeded, that the Company was

making its determination of what to do. At the end of August, when the parties met to sign the retroactive collective bargaining agreement, Anthony Grcich told a Union officer that he still did not know what was to come.

In August, second-year strawberries were disked; in September certain equipment was removed for winter storage; and in October, a majority of the farming equipment was sold. On October 5, the Company told the Union it was "contemplating seriously a permanent closure of operations." It then went out of business.

DISCUSSION AND CONCLUSIONS OF LAW

It is now well established that where a management decision affects the terms and conditions of employment, the employer is obligated to bargain, on request, with the representative of the employees so affected over the effects to them of the decision. Paul W. Bertuccio (1982) 8 ALRB No. 101, citing NLRB v. Royal Plating and Polishing Co. (3rd. Cir. 1965) 350 F.2d 191 [60 LRRM 2033]; A decision to close or sell a business is the type of decision that requires management to bargain over its effects to employees. Highland Ranch and San Clemente Ranch, Ltd., 5 ALRB No. 64, enfd. sub nom Highland Ranch v. ALRB (1981) 20 Cal.3d 848, John V. Borchard aka John V. Borchard Farms and All American Ranchers, aka All American Farms (1982) 8 ALRB No. 52, Royal Plating and Polishing Co., Inc. (1964) 148 NLRB 545, 546.

An employer is required to notify the union and offer to bargain when the tentative decision is made. The employer violates its duty to bargain if it does not notify the union of a decision to close until the company actually closes all or part of its operation. Highland Ranch, supra, Royal Plating and Polishing Co., supra. The duty to bargain attaches even though the decision is not final. In O.P. Murphy Co., Inc. (1981) 7 ALRB No. 37, the Board held that a tentative decision to mechanize agricultural operations where the effect would be to greatly reduce the amount of employment available, required the company to bargain since it is at the tentative stage that union input can best be considered by the employer. Even though the Complaint in the present case does not charge that the Respondent had a duty to bargain about the decision to go out of business (see First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]), bargaining about the effects of the decision is also appropriate at a tentative stage since the impact of any agreements on items such as severance pay, jobs for employees, pensions and insurance, etc., might well be considered by an employer before final arrangements to close are made.

At least by June, 1981, and probably as early as the end of 1980, the Company had reached a tentative decision to go out of the farming business. All of the facts point to this conclusion: the failure to plant first year strawberries in 1980, the proposal to license families to grow

strawberries as independent contractors, the failure to renew the lease, the continual financial losses. Of course, it is theoretically possible that the Company could have changed its mind in August or September, 1981, and managed to plant winter strawberries, but there were no objective factors that would make it probable that the miracle would occur that would reverse their losses and enable them to stay in business.

The Company did not tell the Union of its decision to close until October. However, the Company argues that from what it had been told, the Union knew or should have known about the Company's decision. This argument is not persuasive. Even if the Union actually had all of the information that the Company had, the decision to close was for the Company, not for the Union. The Union is not chargeable with expertise in the strawberry business. The Union does not know, based on the Company's entire financial situation, which losses are acceptable and which are not. The Union had not been discussing loans with the bank. And the Union was not in a position to judge the information it had been given. Statements of financial hardship during collective bargaining are not uncommon, and though this particular company has a history of full cooperation in collective bargaining, its statements about its financial situation were made in the context of getting concessions in negotiations. The Union believed the statements about hardship and made the concessions, but the Union could well have believed from the context of the negotiations that its concessions would have taken away the hardship. For example, at one point, the

Company president explained that the Company could not get a bank loan to continue unless its needs were met. He then listed the changes that he required, and the Union agreed to the changes. Since the Company associated its financial hardship with its bargaining proposals, it was not completely unreasonable for the Union to conclude that some of the problems might have been solved by Union concessions in bargaining.

I find that Respondent violated Labor Code Sections 1153(e) and (a) by failing to notify the UFW during June, 1981 that it had reached a tentative decision to go out of business at the end of the 1981 harvest season and by failing to offer to bargain with the UFW at that time about the effects, if any, on bargaining unit employees of that decision.

The Respondent also argues that even if it committed a "technical" violation by failing to give the Union timely notice of its decision to close, no remedy should be imposed because first, the Union had a full opportunity during the collective bargaining negotiations leading to the contract which was ratified in April, 1981 to bargain about severance pay and other such items, and second, because of the no strike section of that contract, the Union did not suffer any actual damages from the Company's failure to give it timely notice of the decision to close. The Respondent correctly notes that the Company did offer to bargain with the Union about the effects of its decision to close at the end of the season, and the Complaint does not charge any violation of its duty to bargain in good faith in that respect.

Respondent cites the case of New York Mirror (1965) 151 NLRB 834 where the NLRB found that even if the Company violated its duty to bargain by failing to notify the Union of its decision to close until the closure was a fait accompli, no remedy was appropriate because there was no evidence of Union animus and the parties reached contractural settlement of the employees' severance pay and termination rights in the event the unit jobs were abolished. The Company honored its agreement when it sold its operation. Since the Union's sole concern after the shutdown was securing the employees' rights under the contracts, the NLRB held that no remedial order was required.

The agreement between the UFW and the Respondent in effect during 1981 does not contain any provision for severance pay or any provision for the loss of unit jobs. There is no zipper clause. Unlike the employees of New York Mirror, the employees are not entitled to any severance pay or other benefits absent agreement between the Union and the Company. The fact that the Union mentioned this subject in negotiations and then dropped it, and the fact that the Company did not preclude discussion does not absolve the Company of its duty to give the Union timely notice that it has decided to close down and offer to bargain.

The question of whether or not the Union would have been in a better bargaining position to get the Company to agree to severance pay in the summer of 1981 during the harvest season when employees were working than they were

after the end of the season when the operation had shut down is, of course, speculative. Respondent argues that because of the No Strike clause then in effect, the Union could not exercise any economic power and therefore it could have achieved no greater concessions during the harvest season than it could have achieved after the Company had gone out of business. Therefore, according to this argument, as in New York Mirror, it is not appropriate for this Board to impose a remedy.

This argument fails on two grounds. In the first place, it is not at all clear that the contract's No Strike clause 2/ would prohibit all economic action by employees. The NLRB has held that since in a collective bargaining agreement, an agreement not to strike is a trade-off for a binding grievance and arbitration procedure, a No Strike clause is only as broad as the grievance procedure. Gary Hohart Water Corporation, 210 NLRB 742, enf. (7th Cir 1975) 511 F.2d 284; Boys Market v. Retail Clerks (1970) 398 U.S. 235. Since in this case the grievance procedure extends to "all disputes which arise between the Company and the Union out of the

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2/ Article 29 of the collective bargaining agreement effective January 1, 1981, states:

NO STRIKE CLAUSE

A. There shall be no strike of any type. There shall be no boycott of Union label product or no boycott of Parent Company and its subsidiaries by the Union. There shall be no lockout by the Company.

B. If any of said events occur, the officers and representatives of Union and/or Company, as the case may be, shall do everything within their power to end or avert such activity.

interpretation or application of the agreement" and there is no provision for severance pay in the Agreement, presumably the No Strike clause could be interpreted to extend only to strikes over disputes which arise out of the application or interpretation of the Agreement. Such an interpretation would mean that at a time when employees were working, they would not be precluded by the contract from exercising economic pressure on the Company for the granting of an acceptable severance pay. 3/

Second, the NLRB cases presume that employees are damaged by an employer's delay in notifying the Union of a decision to close an operation, even though some employees may continue to work in a successor operation. Transmarine Navigation Corporation (1965) 152 NLRB 998, Supplemental Decision 170 NLRB 389, Royal Plating and Polishing Co., supra. The statement of the NLRB in Walter Pape, Inc. (1973) 205 NLRB 719, 720 [84 LRRM 1055] is typical:

> Although Respondent at a later date expressed willingness to bargain over effects, this was after the collective strength of the employees' bargaining unit had been dissipated, and any bargaining which would have ensued would not have been meaningful in a situation where any action taken by the Union would have been devoid of any economic impact.
> Walter Pape, Inc., Ibid

3/ Respondent also claims that the Union waived its right to object to lack of notice of the Employer's intent to close its Salinas operation because the Union did not object to the Employer's closing its Oxnard and Firebaugh operations in 1978 without notice to the Union. The Union did not abandon its right to bargain over this subject even if it had waived its rights on a similar subject in the past. Murphy Diesel Co. (1970) 184 NLRB 757 [76 LRRM 1469] enfd., 454 F.2d 303 [78 LRRM 2993].

THE REMEDY

As a remedy for Respondent's failure to give the UFW timely notification of its decision to go out of business, the General Counsel requests that the Union be restored some of the bargaining power it lost by requiring that Respondent pay those persons working during its peak 1981 pay period at the rate of their normal wages in 1981, from the date of the Board's decision until the occurrence of the earliest of the following conditions: (a) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the termination of its agricultural operations; (b) a bona fide impasse in bargaining; (c) the failure of the Union to request bargaining within 15 days of this decision; or (d) the subsequent failure of the Union to bargain in good faith. As will appear hereafter, a similar remedy is well established under the National Labor Relations Act. However, as here presented, this remedy neither reproduces the conditions that would have existed had Respondent given the UFW timely notice of its decision, nor is it a fair remedy considering the nature of the violation. During June, 1981, a period which included Respondent's highest employment, Respondent's direct labor costs, not including overhead, or supervisory or office costs, totalled over $281,000 for the strawberry crops. Assuming that employees worked the six day weeks contemplated by the collective bargaining agreement, and assuming that work force remained steady during the whole month, the daily payroll to bargaining unit employees was about $10,800.

The General Counsel is asking the Respondent to pay the employees $10,800 a day almost indefinitely. Under this formula, the UFW is not motivated to reach a quick agreement or allow an impasse to be reached.

Both the ALRB and the NLRB cases in which a remedy similar to the one proposed here by the General Counsel have contained limitations on the amounts of money due employees. In Highland Ranch v. ALRB, 5 ALRB No. 54, affirmed in relevant part (1981) 29 Cal.3d 848, the Board provided that:

> In accord with the remedy developed by the NLRB for this type of violation...we will order Highland to pay to its agricultural employees their daily wages as of November 28, 1977 from five days after the issuance of this decision until: (1) the date Highland bargains to agreement with the UFW about the impact of its decision to close the business; or (2) the date Highland and the UFW bargain to a bona fide impasse; or (3) the failure of the UFW to request bargaining within five days after issuance of this Decision or to commence negotiations within five days after Highland's notice of its desire to bargain; or (4) the subsequent failure of the UFW to bargain in good faith. In no event shall the back pay period exceed the period of time necessary for the employees to obtain alternative employment and, for those employees who were evicted from the labor camp, to obtain other, comparable housing.

The Order in Highland Ranch did not contain a provision for a minimum payment to employees. However, in John V. Borchard Farms (1982) 8 ALRB No. 52, the Board ordered a remedy similar to the Highland Ranch remedy, but specified that "in no event shall the backpay award to any employee be less than he or she would have earned for a two-week period at the rate of his or her usual wages when last in Respondent's employ." The Borchard decision, like the Highland Ranch decision, ordered the employer to pay the employees their usual daily raises as of the day of a layoff found

to be illegal until an agreement was reached on the effects of decision to sell the business or one of the other conditions specified in the Highland decision occurred. The Borchard decision, like the Highland decision, limited the backpay period to the period necessary for employees to obtain alternative employment.

Highland Ranch and Borchard both sold their businesses to successor employers in the course of a campaign against the UFW. Both committed other serious and extensive unfair labor practices. In both cases, the successor employers hired many of the same employees. In that sense, the cases are distinguishable from the present case, where there is no successor to hire the employees and no question but that the Respondent's decision to go out of business was economically motivated.

The NLRB has not restricted the so-called limited backpay remedy for failure to give a union timely notification of a decision to close to cases in which relations between the union and the company were stormy. In both Transmarine Navigation Corporation, 152 NLRB 998, Supplementary Decision 170 NLRB 389, and Royal Plating and Polishing Co., 148 NLRB 545, remanded 350 F.2d 191, Second Supplemental Decision 160 NLRB 990, where the remedy originated, relations between the company and the union prior to the decision to close had been harmonious.

In Royal Plating, where the Board found that the employer had deceived the union by engaging in collective bargaining for a new contract after a decision had been made to close one of

of two plants, the Board imposed the daily pay formula proposed by the General Counsel in this case, but limited the remedy to pay employees no more than the sum they would have made from the date he was notified that one plant was closed until the entire operation was closed (about two months) or until the date that an employee actually got alternative employment. No minimum payment was established. In Transmarine Navigation, the NLRB imposed a maximum backpay of the amount employees would have earned from the date that the employer terminated its operations until the date that the employer offered to bargain (about 7 months) or the time an employee secured equivalent employment elsewhere, whichever came first. (In that case about nine employees were affected, and several obtained employment in the merged business that resulted from the employer's change in operatins). In Transmarine, for the first time, the Board provided that in no event would the sum that the employer was required to provide to each employee be less than the amount an employee would have earned for a two-week period at the rate of his or her normal wages when last employed. NLRB Member Jenkins objected to the provision for two weeks minimum backpay because he was "unable to perceive any principle" upon which it was established.

Subsequent NLRB cases followed the pattern of Royal Plating and Transmarine Navigation in setting limits to the amount of money an employer who failed to give a union timely notice was required to pay while bargaining. A common formula limits the backpay to an amount equivalent to the smaller of

either the amount an employee would have earned from layoff to new employment or the amount an employee would have earned from the date the union was notified of the closing until the date the employer began bargaining over effects. J.B. Enterprises (1978) 237 NLRB 383 [99 LRRM 1432], Van's Packing Plant (1974) 211 NLRB 692 [86 LRRM 1581], Walter Pape, Inc. (1973) 205 NLRB 719 [84 LRRM 1005]. Each of the decisions cited contains a provision granting employees a minimum of two weeks pay.

The facts of the present case are too different from the decided cases for a mechanical application of the remedy previously developed. For one thing, Pik'd Rite continued its operations until the end of the 1981 harvest season without unusual layoffs. Seasonal employees would not have an expectation of further work from that employer until the beginning of the harvest in the spring. The concept of the "time necessary for employees to obtain alternative employment" used by the Board in Highland Ranch and Borchard Farms to measure the employer's maximum liability to each employee is not meaningful here since employees did not lose the opportunity for continued work. For another, in this case the Employer's notification to the Union and his offer to bargain came at the same time, so that the formula used to set the maximum payments in the Transmarine Navigation line of NLRB cases is not appropriate.

Similarly, there is no apparent justification for a two-week minimum wage payment for all employees. Severance pay provisions are not the norm in negotiated UFW contracts;

a two-week provision for all employees is not standard in contracts negotiated in industries subject to the National Labor Relations Act.[4/]

In this case, the employees are deserving of some remedy. The Respondent failed to give them advance notice that the season they were working would be their last. It is not, of course, at all clear that had the employees and the Union been notified they would have opted to bargain for severance pay in exchange for some other benefit they were already getting and it is not clear that employees earning harvest wages would have sacrificed them to strike for severance pay. However, the law requires that strategic decisions such as this be left to both

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In Adam Dairy (1978) 4 ALRB No. 24, the Board held that under its authority to "mak[e] employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain" (Labor Code Section 1160.3), it would calculate the amount the employees would have earned but for the employer's refusal to bargain by considering the average negotiated wage rate in UFW contracts for the relevant period and the reasonable value of fringe benefits from data collected by the Federal Bureau of Labor Statistics.

In a survey of three year nonagricultural contracts taking effect in 1978, the Bureau of National Affairs found that thirty seven percent of the contracts, including forty four percent of manufacturing contracts and twenty six percent of nonmanufacturing contracts, contained some provision for severance pay, but of these, only 39% contianed provisions for severance pay for employees terminated as the result of a permanent shutdown. BNA, Collective Bargaining Negotiations and Contracts § 53 (1978). Generally, the amount of severance pay awarded a particular employee depends on years of service and earnings, with one week's pay per year of service the most common formula. Most of the agreements require a minimum length of service before any severance is paid. Ibid., §53:2.

of the parties operating with knowledge of the facts, and it is not for the employer or a government agency to decide what employees through their union would have done.

On the other hand, the remedy this Board imposed in the Highland Ranch and Borchard cases, where employers who did not cooperate with the UFW and the employers went out of business at least in part to avoid dealing with the Union, should not be imposed automatically in this case, where the employer cooperated in collective bargaining without the need for legal enforcement over a long period of years and established solid, long-term relationships with many employees.[5/]

Accordingly, as in the NLRB cases approved by the California Supreme Court in Highland Ranch v. ALRB, 29 Cal.3d 848, I will recommend that Appellant be ordered to pay certain employees an amount equal to the average of its daily payroll to bargaining unit employees[6/] from 10 days after the decision in this case is final until (1) the date it reaches agreement with the UFW about the impact and effects on its former

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5/ In N.A. Pricola Produce (1981) 7 ALRB No. 49, page 5, the Board said:

> "We also believe that no remedy, including make-whole should be imposed automatically. Rather, all of the circumstances of the individual case--including the overall conduct of each party, and the probable effect of th remedy on the negotiating process--should be considered before deciding what remedy is most appropriate.

6/ The average daily payroll to bargaining unit employees can be calculated by dividing thetotal of direct labor costs to bargaining unit employees (about $1,000,000) by the number of work days during the season and dividing the quotient by the average number of employees in each payroll.

employees of its decision to discontinue its business; or (2) the date it and the UFW reach a bona fide impasse in such collective bargaining; or (3) the failure of the UFW either to request bargaining within ten days after the date this decision becomes final or to commence negotiations within five days after Respondent's notice to the UFW of its desire to meet and bargain collectively in good faith over the matters at issue. In no event shall the pay period for any employee exceed a period of more than ten days, and the wages of any employee working for Respondent after October 5, 1981, shall be subtracted from any sums he or she would otherwise receive.

Only employees who both worked for Respondent during 1981 until laid off and who also worked for Respondent during any two of the four years prior to 1981 shall receive benefits under this Order. Employees who voluntarily quit working for the Respondent during 1981 shall not be included.

Upon the basis of the entire record, the findings of fact and conclusions of law and pursuant to Section 1160.3 of the Act, I hereby issue the following Order:

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Cal-Lina, Inc., its officers, agents, successors, and assigns, shall

1) Upon request, bargain collectively with the UFW with respect to the effects upon the former employees of Pik'd Rite,

Inc. and Cal-Lina of its termination of operations, and reduce to writng any agreement reached as a result of such bargaining.

2) Pay to its terminated employees the amount specified in the remedy section of the attached decision.

3) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due employees under the terms of this Order.

4) Sign the Notice to employees attached hereto. Upon its translation by a Board agent into appropriate language, reproduce sufficient copies for the purposes hereinafter set forth.

5) Mail copies of the attached Notice in appropriate languages within 30 days after the issuance of this Order, to all employees employed at any time between April and October, 1981.

DATED: 3/2/83

Ruth M. Friedman

RUTH M. FRIEDMAN
Administrative Law Judge

NOTICE TO FORMER PIK'D RITE EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by failing to give the United Farmworkers of America sufficient notice of our decision to go out of business. The Board has ordered us to send this notice to our former employees and tell you that we will, on request, continue to meet and bargain with the UFW about what, if anything, we will do about any hardships employees might have experienced because we went out of business. The Board has required us to pay a sum of money equal to the average daily payroll for a period of time while we are bargaining with the UFW. This money will be divided among employees who worked last season without quitting and who also worked at least two of the four seasons previous to that.

DATED: _____

_____
ANTHONY GRCICH
Former President, Pik'd Rite, Inc.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.